

EQUAL PROTECTION OF YOUR VOTE

Montana's Voting Systems and Vote Counting Process

A Report to the 58th Legislature
by the
State Administration and Veterans' Affairs Interim Committee
For the 2001-2002 Interim

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November 2002

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TABLE OF CONTENTS

Chapter 1: An Electoral Crisis	1
Earthquake: November 2000	1
How it unfolded	1
Cracks at the faultlines	2
The U.S. Supreme Court halts the recounts	3
Aftershocks continue	4
Chapter 2: Overview of Montana's Study	5
Study approach	5
Meeting dates and agenda items	5
Staff reports	6
Chapter 3: Findings and Recommendations	7
<u>Recommendation #1</u> : Ban punchcard voting systems	7
<i>Montana voting systems</i>	7
<i>Why ban punchcard ballots?</i>	9
<u>Recommendation #2</u> : Generally revise Montana election laws	10
<i>Inconsistencies in current law</i>	10
<i>To do list</i>	12
To get a copy of the bills	13
Appendix A: Reprint of "Equal Protection For Your Vote" article from <i>The Interim</i> newsletter, Montana Legislative Services Division	
Appendix B: Summary Chart of Recommendations From Other Studies	
Appendix C: Full Text of HJR 8	
Appendix D: Meeting Agendas	
Appendix E: Data on Voting Systems	
Appendix F: Initial Draft of Committee Bill: LC0219	

CHAPTER 1: AN ELECTORAL CRISIS

Earthquake: November 2000

More than 156 million Americans were registered to vote in the November 2000 presidential election, 51.3% of America's total voting age population. Of those registered voters, more than 105 million voted. But an estimated 2 million of those votes were lost--the votes were cast but not counted.¹ The presidency of the United States was ultimately decided by just 536 votes.² Did your vote count?

Although lost votes are not at all a new phenomenon, the excruciating closeness of the vote tallies in Florida, which provided the key electoral votes in the 2000 presidential election, caused an electoral earthquake of constitutional magnitude.

How it unfolded

Americans were still exercising their right to vote when early vote counts across the nation showed that George W. Bush had secured 246 electoral votes to Albert Gore, Jr.'s 241. However, Florida's 25 electoral votes still hung in the balance. Whoever won Florida would win the presidency. First reports seemed to favor Gore. Newscasters announced his victory, but then retracted their announcements. A couple of hours passed. Newscasters again called the race, this time for Bush. But that, too, was later retracted. Polls closed and counts continued. Americans woke the next day to headlines that the race was a virtual tie--simply too close to call.

Later that day, November 8, the Florida Division of Elections reported that Bush had indeed received the most votes with all precincts reporting in, but because his margin of victory was only 1,784 votes, less than 0.5% of the total votes cast in Florida, state law required an automatic statewide recount. Florida's election officials complied. In counties with automatic tabulation equipment, the machines were checked and rechecked and the ballots were reprocessed. Votes were machine-counted once again.

The recount favored Bush, but by an even thinner margin. As allowed by Florida

¹ CalTech/MIT Voting Technology Project, *Voting: What Is, What Could Be*, July 2001.

² Votes counted for Bush in Florida: 2,912,790. Votes counted for Gore in Florida, 2,912,253. Federal Election Commission, *2000 Official Presidential General Election Results*, December 2001.

state law, Gore contested the recount totals in four key counties and asked for a manual recount of the votes for president that the machines had not counted, either because the machines had registered overvotes (more than one vote for the office) or undervotes (no vote for the office).

The recounts were initiated. However, not all of the recounts were completed by November 14, the state's statutory deadline for submitting corrected returns to the Secretary of State following a contest. Secretary of State Katherine Harris declined to waive the deadline, tallied the votes based on partial recounts and, on November 15, officially certified Bush as the winner. Gore filed suit in a Circuit Court to contest the November 14 deadline and argued that the deadline infringed on the right of voters to have their votes counted and that the recounts should continue. The Circuit Court ruled against Gore, but Gore appealed. The Florida Supreme Court ruled in favor of Gore and ordered the recounts to continue and, in a separate ruling, set a new deadline of November 26.

Cracks at the faultlines

While Bush and Gore supporters faced off in the streets, a series of pitched legal battles ensued. Attorneys, legal scholars, election officials, and courts argued over the ballots that had not been manually recounted by the November 14 deadline. Questions, too, were raised about absentee ballot processing. (The deadline for receipt of overseas ballots under Florida's administrative rules was November 17.) Meanwhile, the earthquake that was shaking the foundations of Florida's electoral process was being felt nationwide. A chief election official in Georgia later commented that as the drama unfolded in Florida, one thought was foremost on her mind: "there but for the grace of God go I".³

The November 26 deadline set by the Florida Supreme Court came and went without all ballots having been recounted. The Florida Secretary of State again certified the results, including the partial recounts, and again Bush was declared the winner. Gore filed suit on November 27, challenging the vote counts in Palm Beach, Miami-Dade, and Nassau Counties and arguing that a significant number of legal votes in those counties had not been counted as legal votes and that the number of potential votes for Gore was sufficient to change the outcome of the election. The Leon County Circuit Court ruled against Gore, but Gore appealed and the matter was certified to the Florida Supreme Court. In its December 8 ruling, the Florida Supreme Court explained that the November 26 deadline that they had set was not intended to exclude legal votes that were counted after that date. The Court not only ordered the previously ordered recounts to continue, but ordered manual recounts of ballots in all counties where machines had registered overvotes or undervotes and a manual recount had not yet been

³ National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process*, "Letter to the American People", p. 1, August 2001.

conducted. The mandate of the Court was that all legal votes were to be counted, and the Court defined a legal vote as any clear indication of the voter's intent.

Recounts started and restarted throughout Florida, but the eyes of the nation were fixed on the epicenter, three Florida counties--larger counties with poorer populations, a high percentage of Black voters, and punchcard ballot systems. Newspapers and television stations carried pictures of recount board members holding punchcards to the light and squinting to determine whether there was a clear indication of voter intent. The nation witnessed firsthand the subjectivity of the process and what the U.S. Supreme Court would later note as fact--that what constituted a legal vote under rules adopted by one counting board was not counted as a legal vote by another counting board. Furthermore, in at least one county, the recount board first applied 1990 guidelines that precluded counting a dimpled chad, switched to a rule allowing the dimpled chad to be counted if any light could be seen through it, switched back to the 1990 guidelines, then struggled with whether a hanging chad needed to be hanging by one, two, or three corners to be consider a legal vote under the State Supreme Court mandate to count any clear indication of the voter's intent.

It was Bush's turn to appeal, and he did. The manual recount contest was elevated to the U.S. Supreme Court on the grounds that the Florida Supreme Court's recount order was unconstitutional because it not only established new standards regarding electoral contests, but also because it failed to establish a uniform standard for determining what constituted a legal vote, thus violating the Equal Protection and Due Process Clauses of the U.S. Constitution.⁴

The U.S. Supreme Court halts the recounts

On December 12, 2002, the U.S. Supreme Court in a 5-to-4 decision found that the recount process established by the Florida Supreme Court had violated the Equal Protection Clause of the 14th Amendment. In its majority opinion, the High Court stated that:

[t]he recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of the voter". . . . This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring

⁴ The event summary is based on the summary included in the *Bush v. Gore* opinion. However, there were numerous filings and court rulings, which provide a more complete but complex timeline of events. A more detailed legal timeline is provided at <<http://news.findlaw.com/legalnews/us/election/election2000timeline.html>>.

circumstances is practicable and, we conclude, necessary. . . . The want of those rules here has led to unequal evaluation of ballots in various respects.⁵

The U.S. Supreme Court vacated the Florida Supreme Court's recount order, thus letting stand the certification of Bush as the winner of Florida's 25 electoral votes and the U.S. presidency.⁶

Aftershocks continue

Aftershocks from the electoral earthquake that struck Florida during the November 2000 presidential election prompted numerous national and state studies and a variety of federal and state legislation.⁷ The tremors are still being felt today in counties across the nation.

According to the National Conference of Legislatures (NCSL), by July 2001:

- ✓ 6 states (including Florida) had banned punchcard ballots entirely;
- ✓ 15 states had adopted provisions to buy new voting equipment before the 2002 or 2004 general elections;
- ✓ 14 states had revised laws on counting votes to better define how voter intent is to be determined and what constitutes a legal vote;
- ✓ 16 states had cleaned up their recount and contest procedures;
- ✓ other action encompassed reforms in the following areas:
 - ▶ voting system approval;
 - ▶ accessibility for disabled and elderly voters;
 - ▶ poll worker recruitment and training;
 - ▶ voter registration;
 - ▶ provisional ballots;
 - ▶ absentee voting procedures; and
 - ▶ voter education; and
- ✓ many states, including Montana, had appointed study committees and were still examining their election laws.

⁵ Supreme Court of the United States, George W. Bush v. Albert Gore, Jr., December 12, 2000.

⁶ More information about the Florida "furor" and data about voting system performance is available at **Appendix A**, which is a reprint of an article prepared for the Montana Legislative Services Division's April 2000 *Interim Newsletter*.

⁷ **Appendix B** provides a summary chart of the key recommendations made by several national study commissions.

CHAPTER 2: OVERVIEW OF MONTANA'S STUDY

Study approach

A four-member Subcommittee on Voting Systems, consisting of two Republicans and two Democrats, engaged in a study of voting systems as requested by the 57th Legislature through House Joint Resolution No. 8.⁸

The Subcommittee:

- ▶ reviewed the legal context of the issues;
- ▶ examined the findings and recommendations of various study commissions, including the National Commission on Federal Election Reform (NCFER), the CalTech/MIT Voting Technology Project, the National Conference for State Legislature's (NCSL) Election Reform Task Force, the National Association of Secretaries of State (NASS), and the National Commission on Election Standards and Reform (NCE SR) in conjunction with the National Association of Counties (NACo) and that National Association of County Recorders, Election Officials and Clerks (NACRC);
- ▶ limited the scope of the study to voting system technologies, vote counting processes, and election judge training; and
- ▶ conducted several hearings with expert panels that included clerks and recorders, election judges, school election officials, and other state and county officials.

Meeting dates and agenda items

The Subcommittee conducted a total of four meetings as follows:

- ▶ September 5, 2001;
- ▶ November 14, 2001;
- ▶ January 24, 2002; and
- ▶ April 25, 2002.⁹

⁸ The full text of HJR 8 is provided at **Appendix C**.

⁹ Meeting agendas are included at **Appendix D**. Minutes are available from the Montana Legislative Services Division or online by following the appropriate links on the Division's Internet homepage at <http://leg.mt.gov>.

Staff reports

Staff reports prepared for the Subcommittee and also available from the Montana Legislative Services Division or online through the Division's homepage include:

- ✓ Legal Memorandum, *Meaning and Implementation of Bush v. Gore*, September 4, 2001, by David Niss, Staff Attorney, Montana Legislative Services Division.
- ✓ Summary Chart, *Summary of Election Study Recommendations*, September 2001, by Sheri Heffelfinger, Research Analyst, Montana Legislative Services Division.
- ✓ Legal Memorandum, *Bush v. Gore and Montana Statutes*, November 13, 2001, by David Niss, Staff Attorney, Montana Legislative Services Division.
- ✓ Decision Points, *How to Provide Equal Protection of Votes*, April 25, 2002, by Sheri Heffelfinger, Research Analyst, Montana Legislative Services Division.

CHAPTER 3: FINDINGS AND RECOMMENDATIONS

Recommendation #1: Ban punchcard voting systems

The 58th Legislature should adopt bill draft LC0219 to ban the use of punchcard voting systems after December 31, 2003.

Montana voting systems

Information provided by the Secretary of State's office showed that three types of ballots are used in Montana: (1) optical scan ballots, (2) manually counted paper ballots, and (3) punchcard ballots.

- ✓ 30 Montana counties use optical scan systems. Optical scan ballots are paper ballots that are processed through optical scanning equipment that identifies and automatically tabulates the votes it recognizes as "legal". There are different models of optical scan equipment with slightly different sensitivities for picking up a stray mark (thus potentially registering an overvote) or for not counting a vote, for example, when an oval has been "x"ed instead of completely filled in (thus potentially registering an undervote). As of November 2000, the following counties used some type of optical scan system:

Big Horn	Musselshell
Carbon	Park
Cascade	Pondera
Custer	Powell
Dawson	Ravalli
Deer Lodge	Richland
Gallatin	Roosevelt
Hill	Rosebud
Jefferson	Sanders
Lake	Sheridan
Lewis and Clark	Silver Bow
Liberty	Stillwater
Lincoln	Toole
Madison	Valley
Missoula	Yellowstone

- ✓ 20 Montana counties use manually counted paper ballots. The following counties used paper ballots that are manually counted by a board of election judges--one election judge reads the ballot and determines (based on guidelines established by the election administrator) what is or is not a "valid" vote, while two other judges keep a tally:

Beaverhead	Meagher
Blaine	Petroleum
Carter	Phillips
Chouteau	Powder River
Daniels	Prairie
Garfield	Sweet Grass
Golden Valley	Teton
Granite	Treasure
Judith Basin	Wheatland
McCone	Wibaux

- ✓ 6 Montana counties use punchcard ballot systems (CES Votomatics): A punchcard ballot is a paper ballot. A vote is cast by sliding the punchcard into a ballot frame listing the candidates and issues to be voted on. The voter then punches the appropriate chad out of the ballot with a stylus. The punchcard is then removed from the frame. The election judges typically prepare the ballots for machine processing by running a hand over the front and back of the cards to dislodge any loose or hanging chads, which could cause the counting machine to reject the ballot. The ballots are then fed through a machine that automatically tabulates the votes. If a ballot is rejected, an election judge may transfer the votes to a new card that can then be processed by the machine. The counties that use punchcard ballot systems are:

Broadwater	Flathead
Fallon	Glacier
Fergus	Mineral

A few school districts use lever machines for school elections. A lever machine is a nonpaper-based system. A voter enters a booth and casts a vote by pushing down the appropriate lever. No paper record is made of the voter's ballot. Each machine keeps a running total of votes for each candidate and ballot issue. No direct recording equipment (DRE) systems are in use in Montana. These systems are also paperless. Votes are recorded and tallied electronically.

Additional information on voting systems is available.¹⁰

Why ban punchcard ballots?

The Subcommittee on Voting Systems determined that Montana should ban the use of punchcard ballot systems starting January 1, 2004, based on the following findings:

- ✓ According to the CalTech/MIT study, punchcard ballot systems have the highest rate of unmarked, uncounted, and spoiled ballots over the last four presidential elections than any other voting system.¹¹
- ✓ Voters have lost confidence in the punchcard ballot system as a result of Florida's experience and even if Montana has not yet encountered serious problems with punchcards, the potential should be avoided.¹²
- ✓ Although sensitive to the fact that six counties would be required to purchase new voting systems to replace their punchcard systems, the ban is necessary to protect voters' rights and would not be an unfunded mandate because it does not impose a new duty on the counties.¹³
- ✓ Most of the Montana counties using punchcard systems are already taking steps to replace those systems.¹⁴

¹⁰ **Appendix E** provides: (1) an extract from the CalTech/MIT study that shows the residual vote rate of the five major types of voting systems; (2) the Federal Election Commission's description of each type of voting system; and (3) summary tables showing the voting systems used in each Montana county, whether the county also administers school elections, and whether votes are tabulated centrally or at each precinct.

¹¹ CalTech/MIT Voting Technology Project, *Voting: What Is, What Could Be*, p. 21-22.

¹² State Administration and Veterans' Affairs Interim Committee, Subcommittee on Voting Systems, Minutes, April 25, 2002, Montana Legislative Services Division.

¹³ Legal Memorandum, "Whether Banning Punchcard Ballots is an Unfunded Mandate", January 2002, by Valencia Lane, Staff Attorney, Montana Legislative Services Division.

¹⁴ State Administration and Veterans' Affairs Interim Committee, Subcommittee on Voting Systems, Minutes, January 24, 2002, Testimony from Montana Secretary of State Bob Brown, Office of Secretary of State, Montana Legislative Services Division.

Recommendation #2: Generally revise Montana election laws on voting systems and vote-counting procedures.

The 58th Legislature should adopt LC0220. In drafting LC0220, the Subcommittee endeavored to retain current policy and practice to the extent possible, but to add safeguards that would provide equal protection of votes regardless of which voting system was used or whether a ballot was manually processed or machine-counted.

The key policy decisions reflected in the bill include:

- ✓ continuing to allow counties to choose which voting system to use, provided that the system has been approved by the Secretary of State;
- ✓ directing the Secretary of State to adopt a benchmark performance measure that must be met by any voting system before it can be approved;
- ✓ requiring that if an automated system rejects a ballot or records an undervote or overvote on the ballot, the ballot must be set aside and manually evaluated so that it can either be processed by the system or manually counted;
- ✓ directing the Secretary of State to adopt uniform rules on what constitutes a valid vote for each type of ballot used in the state; and
- ✓ providing that when manually counting votes, a vote is valid if the voter's intent can be clearly determined as agreed upon by a majority of election judges applying uniform rules adopted by the Secretary of State.

Inconsistencies in current law

Current law allows counties to use any voting "device or machine" approved by the Secretary of State.¹⁵ The Secretary of State also has general authority to

¹⁵ Section 13-17-104, MCA.

specify the ballot form for "all types of ballots used in this state"¹⁶ (which includes manually counted paper ballots) and to prescribe rules for "the complete procedures necessary" for the use of any approved voting machine or device.¹⁷ However, these laws are broadly worded, which allows for inconsistent application of safeguards to protect a voter's right to equal protection when having his or her vote counted or rejected.

Also, although functional for paper ballots, terminology used in current law makes no distinction between paper ballots that are manually counted and paper ballots that are machine-tabulated. For example, section 13-12-209, MCA, specifies that "paper ballots shall be printed on the same sheet with a stub" and specifies that on the stub must be printed instructions that the voter should mark the ballot with an "x" to indicate the voter's choice. However, optically scanned paper ballots typically require the voter to completely darken an oval. Marking an "x" on an optically scanned ballot may not be recognized by the scanner as a valid vote.

Additionally, although Title 13, chapter 17, MCA, governs the use of voting "machines or devices", which by definition would cover any ballot, paper or nonpaper, that is processed by a machine, it provides only broad guidance on how the other election laws are to be applied. This leaves ambiguities and gaps subject to various interpretations. For example, section 13-17-106, MCA, states that general election laws apply "if they are not in conflict with the provisions of this chapter", and section 13-17-107, MCA, requires the Secretary of State to adopt rules for "the complete procedures necessary to use each type of voting machine or device". Yet, no provision states that those standards must be uniform or requires the Secretary of State to define what constitutes a valid vote for each type of ballot or system used. As was evident in Florida during the 2000 presidential election, without such standards and definitions, there is no guarantee that votes will receive equal treatment.

Finally, many current statutes on election procedures contain overlapping or potentially conflicting provisions. For example, section 13-15-103, MCA, specifies that counting boards must start their counts after the polls close. Later amendments to that section have added an exception for counties using voting machines or devices so that counts can start before the polls close. But this and other similar "add-on" provisions related to machines or devices overlaps the chapter 17 provision that requires the Secretary of State to adopt rules governing "the complete procedures necessary" to use voting systems. Other examples of overlapping but uncoordinated provisions include section 13-15-202, MCA, which specifies how vote counts are to proceed, but includes no reference to related

¹⁶ Section 13-12-202, MCA.

¹⁷ Section 13-17-107, MCA.

vote count provisions in section 13-15-103, MCA. Furthermore, section 13-15-202, MCA, describes how absentee ballots are to be processed, but makes no reference to section 13-15-104, MCA, which also contains provisions on absentee ballots.

Each of these examples illustrates the need for a general revision to clean up existing law.

To do list

Based on its examination of current law and the findings of the U.S. Supreme Court in Bush v. Gore, the Subcommittee made policy decisions¹⁸ that translated into the following "to do list", each of which is accomplished in the proposed legislation (LC0220):

- ✓ Different voting systems but one performance standard. Rather than mandating that one type of voting system be used statewide, counties should continue to be allowed to choose from among a list of approved voting systems. However, the Secretary of State should set a benchmark performance standard as a minimum criteria to be met by all voting systems before they can be approved. Furthermore, election administrators should collect and forward data on system performance.
- ✓ Defining a valid vote for all types of ballots. The Secretary of State should develop uniform procedures to govern the use of each type of voting system in the state based on the statutory definition that provides that a valid vote is a vote recognized by the machine, *except in cases when a system rejects a spoiled ballot or records an overvote or undervote on the ballot, in which case the ballot must be set aside and manually evaluated.* The Secretary of State should also develop uniform standards for counting boards to follow when determining what is a valid vote on a manually processed ballot.
- ✓ Closing a loophole for write-in candidates. To apply uniform standards for counting write-in votes, a loophole in current statute that allows votes for a write-in candidate who has not filed a declaration of intent should be closed so that write-in votes may only be counted if the candidate is identified by the name, nickname, or initials officially recorded in the declaration.¹⁹

¹⁸ State Administration and Veterans' Affairs Interim Committee, Subcommittee on Voting Systems, Minutes, April 25, 2002.

¹⁹ See section 13-10-211(5), MCA.

- ✓ Training. Current training criteria for election judges (training and certification at least every 2 years) should be retained but clarified and statutory language should be strengthened with respect to applying training standards to school election administrators and judges.
- ✓ Updating terminology with an eye on the future. Terminology used in Montana's statutes should be updated to distinguish between manually processed ballots and machine-processed or system-processed ballots and between paper-based and nonpaper-based voting systems.
- ✓ Clarifying existing law. Current laws should be tightened to clarify ambiguities, eliminate overlapping and potentially conflicting provisions, and fill gaps.

To get a copy of the bills

The most current texts of the bill drafts to implement the findings and recommendations of the Subcommittee on Voting Systems--LC0219 to ban punchcard systems and LC0220 to generally revise laws on voting systems and vote-counting procedures--will be available online during the 2003 Session.²⁰

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²⁰ See **Appendix F** for the initial draft of LC0219.

Appendix A

Reprint of Back Page Article
The Interim, April 2001

BACK PAGE
Reprint

EQUAL PROTECTION FOR YOUR VOTE

By Sheri Heffelfinger
Legislative Research Analyst

While Americans watched the broadcast news networks call the 2000 presidential election first for Gore, then for Bush (or perhaps Gore did win--no, Bush it is) votes were still being cast, counted, and recounted. However, more was at stake than the presidency of the United States. At stake was how we define a vote and whether what is a vote in one case but is not a vote in another case violates a voter's right to equal protection.

TO COUNT OR NOT TO COUNT

Americans take for granted that a vote cast is a vote counted. However, the reality is that close elections, recounts, or potentially controversial subjective determinations of what is or is not a vote occur in every election in every jurisdiction all the time. According to a study by the California Institute of Technology and the Massachusetts Institute of Technology (Caltech/MIT), which was commissioned in the wake of the "Florida furor" during the 2000 presidential election, an estimated 4 to 6 million votes for president were lost nationwide in 2000. That's about 2% of the votes cast. Yet, in the 2000 presidential election, the winner's margin was less than 1/2 of 1% in four states: Florida, Iowa, New Mexico, and Wisconsin. Furthermore, the Caltech/MIT study also estimated that the incidence of spoiled, unmarked, ambiguous, and uncounted votes (i.e., lost or residual votes) is much higher, 5%, in U.S. Senate or state gubernatorial elections.

WHY ARE VOTES LOST?

According to the Caltech/MIT findings, of the estimated 4 to 6 million votes lost in the 2000 presidential election, 1.5 million were lost because of faulty equipment, 1.5 to 3 million were lost because of voter registration mixups, 1 million were lost because of problems with polling place operations, and an unknown number of votes were lost because of problems counting absentee ballots.

WHAT DOES *BUSH v. GORE* MEAN FOR MONTANA?

However, irrespective of the whys and hows of residual vote rates, the main issue raised in Bush v. Gore was whether the vote counting process in Florida violated a voter's right to equal protection. The U.S. Supreme Court, reviewing the decision of the Florida Supreme Court, concluded that the process ordered by the Florida Supreme Court did not provide for uniform standards or guidelines on how a vote was to be counted. Thus, the process used for determining voter intent (as required by Florida statute) did not satisfactorily guarantee that voters received equal protection under the law. To quote the U.S. Supreme Court's opinion in Bush v. Gore:

The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirements of nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider "the intent of the voter". . . . This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The 57th Legislature passed a study resolution (House Joint Resolution No. 8) to examine these matters and develop recommendations. The study was assigned to the State Administration and Veterans' Affairs Interim Committee (SAIC) and, in turn, to the SAIC's HJR 8 Subcommittee on Voting Systems. What is apparent from the discussions held during the Subcommittee's meetings is that casting votes and counting votes are inherently subjective processes. However, various technologies have been invented to mitigate subjective determinations to the extent possible and to help vote counters cope with the sheer volume of the votes to be counted.

AVAILABLE TECHNOLOGY

There are a variety of different voting systems or technologies. The most simple, of course, is a paper ballot, a No. 2 pencil, and a secret voting booth. Many paper ballots can be counted "manually", that is, with human eyes. In Montana, 20 counties use manually counted paper ballot voting systems. Then there are the optical scan technologies that also use a printed paper ballot, but the votes are counted by machine eyes that count only certain marks as votes. Thirty Montana counties employ optical scan systems. A punchcard voting system uses a computer punchcard. A vote is cast when the voter punches out the appropriate chad with a stylus. Montana has six counties that use the punchcard voting system. The old style lever machines do not involve any kind of paper ballot. Rather, votes are cast by pushing down a lever. The lever machine simply keeps a running total of the number of times that a certain lever is pushed. A few Montana school districts use these old lever machines. Finally, there are more recent technologies that allow for electronic voting, such as direct recording electronics (DRE), touch screen video machines, or Internet-based systems. These systems do not involve paper ballots at all. A few of the most populous counties in other states have moved toward electronic voting system technology, but the jury is still out in most of the country concerning the security and desirability of some of these systems. There are no electronic voting systems in use in Montana.

VOTERS ARE ONLY HUMAN

No matter the technology used, the HJR 8 Subcommittee on Voting Systems is finding that subjectivity and human error cannot be removed from the vote counting process because we voters are, after all, only human. We make

mistakes. Sometimes these mistakes are our own fault. Sometimes our mistakes are caused by faulty or difficult to use equipment.

For example, you may have marked a ballot with an "X" when you should have darkened in the oval. In a manual count, the human counter would have to determine whether you marked an "X" because you intended to vote for that candidate or because you did not want to vote for that candidate. Furthermore, in one county, the counters may have been instructed to interpret an "X" as a vote, while in another county, the counters may have been instructed to interpret an "X" as a nonvote.

Perhaps you were using a punchcard ballot and didn't punch the chad all the way out. Consequently, a chad was left hanging by two corners. Did you leave the hanging chad because you started to punch out the chad, then realized you were punching out the wrong chad and stopped, or did you really mean your vote to be counted but have trouble with the stylus? In any case, imagine that before your ballot was placed into a machine, an election judge, following proper instructions, ran a hand over the ballot to dislodge loose chads but your questionable chad did not fall. No matter what you intended, your vote would not be counted. However, imagine another voter's ballot with a similar chad, but the election judge used a harder touch and the chad did fall out, so that vote was counted. Then imagine that the election was very close, so a manual recount was ordered and your ballot was examined by human eyes. The counter, seeing that two corners of the chad were punched out, interpreted your hanging chad as a vote and so counted it. However, another counter, looking at a similar chad, had been instructed to count a hanging chad as a vote only if it was hanging by one corner, so would not have counted your vote.

Perhaps you voted on an optical scan ballot but left a stray mark next to the name of a candidate for whom you did not want to vote. Nevertheless, the scanner recorded the mark as a vote, which resulted in the machine seeing two votes for the office. Consequently, the machine determines you voted twice and your vote is void. Again imagine that it was a close election, a manual recount was ordered, and a human pair of eyes looked at your ballot. The human counter clearly sees your mark as a stray and counts your vote. Would another counter in another county have counted that mark as a vote, or not?

Then imagine, as was the case in Florida, that in the middle of the recount of the ballots in any of the above examples, the guidelines for interpreting the voter's intent changed midway through the recount so that what was a vote prior to 2 p.m. that day was not counted as a vote after 2 p.m.

If you can imagine these situations, you can begin to appreciate the complexity of the issue and the difficulty involved in guaranteeing equal protection for your vote.

WHEN IS A VOTE NOT A VOTE?

As illustrated above, the answer to the question of when is a vote not a vote is, it all depends. It all depends on the ballot being used, whether the ballot is

manually or machine counted, the reliability of equipment used, the instructions given to voters, the guidelines given to election judges in each county, and even the mood of the person on the recount board running a hand over a punchcard or of a counter trying to distinguish a stray mark from a real vote.

ALL VOTING SYSTEMS ARE NOT CREATED EQUAL

In considering how best to manage the inevitable human subjectivity involved in casting and counting votes, the HJR 8 Subcommittee on Voting Systems is focusing on voting technologies and the track records of these systems. The Caltech/MIT study discovered that manually counted paper ballot systems, optical scan systems, and lever machines consistently performed better (had fewer incidences of residual votes) than punchcard systems or DREs. The study was particularly critical of the punchcard system, citing data that punchcard systems had the highest average residual vote rate of all the systems evaluated in relation to presidential elections, 2.5%, while optical scan systems and lever machines had the lowest residual vote rate, 1.5%. Hand-counted paper ballot systems showed a 1.8% residual vote rate. However, this data does not necessarily reveal the actual residual vote rate of systems used in Montana by local election administrators. Depending on such factors as the training given to election judges, the guidelines applied by recount boards, or even the clarity of instructions to voters, a particular system could actually perform better or worse than reported in the Caltech/MIT study.

SHOULD PUNCHCARD SYSTEMS BE REPLACED?

Based on the findings of various studies and a belief that the public lacks confidence in the punchcard system because of the events in Florida, the Montana Secretary of State is encouraging the six Montana counties (Broadwater, Fallon, Fergus, Flathead, Glacier, and Mineral) that use punchcard voting systems to change to optical scan equipment. However, cost is an issue. Some cost estimates suggest that purchasing optical scan equipment for these six counties would cost a total of about \$250,000, not including the cost of peripherals, such as ballot boxes, secrecy sleeves, etc., or the cost of operation and maintenance. Other estimates suggest that the cost to change to optical scan equipment would be about \$2 for each voter, which for Flathead County, with about 35,000 voters who turned out in 2000, would amount to at least \$70,000. Furthermore, some election administrators using punchcard systems maintain that it is actually a better system than an optical scan system if, as would be true with any system, it is used properly. However, if systems are to be changed, then who should pay the bill? Who should set the standards for what should or should not be counted as a vote, how should those standards be set and what will ensure that the standards are applied equally statewide?

WHAT POWERS SHOULD THE SECRETARY OF STATE BE GIVEN?

Current state statute provides that an election cannot be conducted in Montana with a voting device or machine that has not been approved by the Secretary of State (see section 13-17-101, MCA). However, the statutory guidance on the standards to be applied in approving or disapproving a voting system is narrowly

focused on the nuts and bolts of ensuring that voters can cast their ballots in secret, prohibiting a voter from casting more than one vote for a candidate, and providing safeguards to prevent tampering with the equipment for fraudulent purposes. (See section 13-17-103, MCA.) Still, the fact remains that elections have traditionally been the purview of local governments. State control of a process that is administered and paid for locally is a controversial issue that warrants a judicious decisionmaking process.

The HJR 8 Subcommittee on Voting Systems and ultimately the Legislature will have to carefully navigate through these fiscal and policy issues while ensuring that Montana's election laws are written and applied so that your right to equal protection is not violated.

**EQUAL PROTECTION OF YOUR VOTE:
MONTANA'S VOTING SYSTEMS AND VOTE
COUNTING PROCESS**

October 2002

Published By



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